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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>TODD BRADLEY TARTAGLIA,<br>Defendant and Appellant. | G039804<br>(Super. Ct. No. 03SF0727)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Leaonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Todd Bradley Tartaglia of three counts of oral copulation of a person under 16 years of age (Pen. Code, § 288a, subd. (b)(2)),[1] three counts of oral copulation by drugging his victim (§ 288a, subd. (i)), one count of genital or anal penetration by a foreign object of a drugged person (§ 289, subd. (e)), and possession of child pornography (§ 311.11, subd. (a)). The trial court sentenced defendant to 10 years in prison. On appeal, defendant contends his attorney rendered ineffective assistance by failing to object to expert testimony the Attorney General concedes exceeded the bounds of permissible evidence concerning Child Sexual Abuse Accommodation Syndrome (CSAAS). Defendant also argues the trial court erred in failing sua sponte to provide the jury with a limiting instruction on CSAAS. As we explain below, defendant's contentions furnish no basis for reversal for two reasons: (1) the record discloses a sound tactical reason for defense counsel to withhold objection, i.e., the expert's testimony opened the door for defendant to elicit favorable testimony concerning the victim's psychology and behavior, and (2) any error in failing to object to the testimony or failing to provide a CSAAS limiting instruction was harmless, given the overwhelming evidence — including DNA evidence — against defendant. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Defendant befriended F.M., a single woman with two children, including 14-year-old S.S., in March 2002. Claiming heartbreak from a recent breakup, defendant informed F.M. he was not ready for a sexual relationship with her. Defendant focused his attention on S.S. He moved the family computer from the living room into her room and installed an internet connection. Through October and November, he obtained codeine

[1] All further statutory references are to the Penal Code, unless otherwise specified.

(an opiate), Xanax and Diazepam (benzodiazepines), and the sleep-aid Ambien from multiple pharmacies in Orange County. On November 7, 2002, after spending the day shopping with S.S., defendant called F.M. to request that S.S. be permitted to spend the night at his condominium. Trusting defendant, F.M. consented. Defendant gave S.S. four large pills when she complained she was not feeling well. The medication made her very sleepy and she could not recall what happened that evening. Because she was still "out of [it]" when defendant returned her the next day, F.M. took S.S. to the hospital, where her urine tested positive for opium and benzodiazepine. F.M. called the police but stopped cooperating with them after defendant, crying and professing his love for her family, claimed innocence.

Defendant set up a Webcam and several software programs on S.S.'s computer in December. He insisted S.S. keep the camera underneath the desk and pointed towards the room when not in use. Periodically, S.S. and F.M. observed the computer turn on by itself. Using his instant message screen name, "kissinandlickin," defendant created an alternate identity, "Chantel," which he used to communicate with S.S. S.S. asked Chantel to take on the role of a big sister for her, but Chantel wanted to be her girlfriend and sent her a nude picture. Engaging S.S. in sexually explicit conversations, Chantel persuaded her to masturbate in front of the Webcam. Defendant recorded the scene remotely. S.S. began to suspect defendant was Chantel because he used identical, unique abbreviations when chatting on-line.

Defendant promised S.S. he would teach her to surf. Defendant persuaded F.M. to allow S.S. to spend the night with him five to eight times on the pretext of going surfing early the next day. Defendant never took her surfing. Instead, he served her alcohol and pressured her to drink. After drinking a small amount, S.S. would lose

consciousness, remembering little of what transpired after she passed out. She recalled waking up on three occasions and seeing defendant with his head between her legs, orally copulating her. She recalled waking up in defendant's bed naked on one occasion. Once she woke up with her head on defendant's penis. Defendant would praise her when she woke up, saying, "You have a sexy pussy" and "'You were crazy last night.'"

Defendant warned S.S. that her mother would "'freak'" if she discovered their trysts, and send her to boarding school. Defendant would not let F.M. speak to S.S. on the mornings after she stayed over, claiming S.S. needed to sleep and mollifying F.M. with details of their fake surfing trip. S.S. did not report the abuse to her mother because "I guess it was hard to kind of process" and S.S. "didn't want to believe it." She did not want to disrupt the family life defendant had created or upset her mother, who was "happy finally," nor lose defendant as a father figure.

On one occasion, F.M. and the children stayed at defendant's condo, with defendant sleeping on the couch. After F.M. left S.S. sleeping, clothed, to go to work, defendant blocked the bedroom door with a piece of furniture while S.S.'s six-year-old brother watched television in the living room. The brother entered the bedroom a few hours later, when defendant stepped out of the condominium, and discovered S.S. passed out on the bed wearing only a shirt and underwear.

On pretext of surfing the next day, defendant had S.S. stay the night with him on December 25. She felt dizzy after drinking pink wine defendant gave her. He lured her into the bedroom by stating Chantel left something for her there. Defendant produced a black bag containing women's underwear, a vibrator, and a dildo. At defendant's urging, she tried on the panties and modeled them for him. He grabbed her hand, placed it on his crotch, and said, "'Look how you make me feel.'" Eyeing a

camera on the desk, defendant invoked Chantel, claiming she wanted a picture. S.S. soon passed out, waking to find herself on the floor in front of the television, which displayed an image of her vagina. Regaining consciousness again later, she heard defendant praise her, "'You're doing good. Good job,'" as he inserted the vibrator in her vagina. She passed out again.

The next day, defendant told F.M. that S.S. would stay the night again. F.M. visited the condo that evening and found S.S. lying in defendant's bed, very drowsy and with wet hair but no memory of showering. Defendant pulled F.M. from the room insisting she allow S.S. to sleep. Defendant took F.M. and her son out to dinner on December 27, but S.S. was too tired to go along. After dinner, F.M. considered taking S.S. to the hospital because she was behaving strangely, but when defendant telephoned her every 10 minutes for an update, she decided against it.

Defendant's mother hosted a small party New Year's Eve that F.M. and her family attended. Defendant pressured F.M. to drink. According to defendant's mother, defendant put F.M. to bed after she became intoxicated. According to S.S., and corroborated by two of her male friends, defendant then took her to his condo for a party, also picking up her friends and four or five 14-year-old girls she did not know. The only adult at the party, defendant made alcoholic drinks for the children, and everyone spent the night.

Defendant dropped S.S. off at home the next day, then retrieved her so they could shop for a surfboard, but rebuffed F.M.'s interest in accompanying the pair. Instead of a surfboard, defendant bought jewelry for S.S. Growing alarmed in her absence, F.M. demanded that S.S. return. Defendant complied angrily. After he left, S.S. admitted she had never been surfing and disclosed some of defendant's conduct. F.M.

took S.S. to the hospital, where her urine tested positive for benzodiazepine. F.M. called the police.

Police investigators discovered a black bag containing women's underwear, a dildo, and a vibrator in defendant's garage. The underwear contained defendant's sperm and S.S.'s epithelial cells, which line the mucous membranes of the mouth, vagina, and anus. The dildo also had S.S.'s epithelial cells on it and sperm matching defendant's DNA, and the vibrator yielded DNA from both defendant and S.S. The police found remote access software had been installed on S.S.'s computer on December 13, 2002, with complementary software on defendant's computer, enabling him to control her machine. He could turn on her Webcam and record her. The investigators discovered two videos on defendant's computer of S.S. undressing in her room, plus the video of her masturbating for Chantel. His computer also contained child pornography and a document detailing the use of Flumazenil to treat pediatric overdoses of benzodiazepine.

Dr. Martha Rogers testified at trial concerning CSAAS. She explained CSAAS is a theoretical model used by therapists to categorize behavior that is typical of patients who report child abuse. She explained the initial expositor of CSAAS, Dr. Roland Summit, "posited five stages, if you will, of what happens in these cases. And he labeled them secrecy, helplessness, entrapment and accommodation, delayed reporting, and retraction." After explaining each of the five stages, Rogers went further and detailed the manner in which the specifics of S.S.'s psychology and behavior fit all of the "aspects" of CSAAS, except retraction. In fitting S.S. to the CSAAS model, the prosecutor elicited from Rogers that she had interviewed S.S. and performed psychological testing on her, and had also interviewed S.S.'s mother and reviewed police investigation reports. Following the jury's verdict, defendant moved for a new trial on

grounds Rogers's overstepped the bounds of permissible expert testimony and that the trial court erred in failing sua sponte to instruct the jury on the limitation of CSAAS for evidentiary purposes. The trial court rejected defendant's motion, entered judgment on the verdict, and defendant now appeals.

II

DISCUSSION

Defendant contends his attorney rendered ineffective assistance by failing to object to portions of Rogers's testimony beyond the scope of permissible CSAAS testimony. Defendant's argument is inadequate to win reversal for two reasons. First, counsel may have had a tactical reason for declining to object. Second, even assuming reasonably competent counsel should have objected to aspects of Rogers's testimony, any error in failing to do so was harmless.

The Attorney General concedes Rogers "did exceed the proper bounds of CSAAS testimony" by specifically "describ[ing] the ways in which [S.S.]'s behavior was consistent with the CSAAS model." In other words, Rogers, after explaining she reviewed the police reports, interviewed S.S.'s mother, and interviewed S.S. and performed psychological testing on her, effectively diagnosed S.S. with CSAAS. The CSAAS *model* is admissible, as here, to rehabilitate a child victim's credibility by "'disabus[ing] jurors of commonly held misconceptions about child sexual abuse.'" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1301 (*McAlpin*).) CSAAS helps "'explain the emotional antecedents of abused children's seemingly self-impeaching behavior,'" such as delayed reporting, continued voluntary contact with the perpetrator, and recantation. (*Ibid.*)

CSAAS experts, however, are not permitted to engage in a detailed correlation of the model to particular conduct of a particular victim. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394-395 (*Bowker*).) Nor may the expert *diagnose* a victim with CSAAS because, as with rape trauma syndrome, "the use of this terminology is likely to mislead the jury into inferring that such a classification reflects a scientific judgment that the witness was, in fact, raped" (*People v. Bledsoe* (1984) 36 Cal.3d 236, 251, fn. 14 (*Bledsoe*)) or subjected to child sexual abuse (*McAlpin, supra*, 53 Cal.3d at pp. 1300-1301). The inference that science has thrown its judgment behind a conclusion the child was raped or abused is unwarranted because, for purposes of therapy, the CSAAS therapist "*assumes* a molestation has occurred . . . ." (*Bowker*, at p. 394.) As with rape trauma syndrome, the CSAAS therapist's role is not to ferret out the truth, but rather "'to provide services to [the] client, not to make a judgment about whether a "real" rape occurred or about the victim's culpability.'" (*Bledsoe*, at p. 250.) Consequently, because CSAAS "was not developed as a truth-seeking procedure but rather as a therapeutic aid, it cannot be used for a different purpose, i.e., to prove a molestation occurred." (*In re Sara M.* (1987) 194 Cal.App.3d 585, 593.) As noted, by delving into specifics about the victim, an expert risks transmuting general, rehabilitative testimony about abused children as a class into testimony the jury may misinterpret as expert opinion on whether the charged abuse occurred.[2]

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[2] As the *Bowker* court explained: "It is one thing to say that child abuse victims often exhibit a certain characteristic or that a particular behavior is not inconsistent with the child having been molested." (*Bowker, supra*, 203 Cal.App.3d at p. 393.) "It is quite another to conclude," as a jury may erroneously infer from extensive and specific testimony seeming to amount to a medical diagnosis, "that where a child meets certain criteria, we can predict with a reasonable degree of certainty that he or she has been abused. The former may be appropriate in some circumstances; the latter . . . clearly is not." (*Ibid.*)

While we agree with the defendant and the Attorney General that the prosecutor took Rogers too far in a point-by-point exposition of the manner in which S.S.'s specific psychological test results and particular behavioral and psychological dynamics with defendant fit the assumptions inherent in the CSAAS therapy model, we agree with the Attorney General that defense counsel's failure to object to this testimony does not require reversal. Indeed, as the Attorney General points out, a tactical reason may have prompted defense counsel *not* to object. Simply put, by failing to object when Rogers strayed into specifics concerning S.S.'s psychology and behavior, defense counsel profited from an open door to delve into these topics, eliciting damaging information available only from Rogers that fit the defense theory S.S. fabricated the charges. For instance, through Rogers, defense counsel established that S.S. felt pressure from her mother and the police to disclose the alleged abuse. Counsel also elicited that S.S. revealed on a personality exam that "'I often get confused'" and "'people are out to get me,'" and that her clinical depression, history of family abuse, and peer environment arguably clouded her claims. "The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.) We do not second-guess these tactical choices, at least not in the absence of a fully-developed record that includes defense counsel's explanation.

Moreover, even assuming arguendo counsel should have foregone the opportunity offered by Rogers's misstep and objected to the specifics of her CSAAS testimony, any such error by counsel was harmless beyond a reasonable doubt. To prevail on a claim of ineffective assistance of counsel, the claimant must show not only that counsel's performance was deficient under an objective standard of professional responsibility, but also that it is reasonably probable the defendant would have received a

more favorable result at trial but for counsel's alleged error. (*Strickland v. Washington* (1984) 466 U.S. 668.) Here, a more favorable result is unlikely if counsel had objected because, as the Attorney General correctly observes, "the evidence of [defendant]'s guilt was staggering."

Recovery of defendant's DNA and sperm on S.S.'s underwear and on a dildo and a vibrator in a black bag in defendant's garage overwhelmingly connected defendant to sexual misdeeds with S.S. This evidence strongly corroborated, for example, S.S.'s account that defendant gave her a black bag containing the items and that, after she passed out, she awoke to find defendant inserting the vibrator into her vagina. Abundant evidence showed defendant obtained medications and sleeping pills containing opiates and benzodiazepine around the time of the offenses, and the document recovered on his computer explaining how to counteract pediatric benzodiazepine overdosing tied him to S.S.'s positive urine samples and to the pronounced drowsiness she experienced in defendant's care. Defendant set up a Webcam for S.S., and defendant's computer yielded videos he surreptitiously recorded of her undressing and masturbating. Records on his computer also indicated he created the "Chantel" persona he used to engage in sexually explicit on-line exchanges with S.S.

In the face of this overwhelming evidence, it is not reasonably probable Rogers's testimony tipped the verdict against defendant. Her testimony was more muted than the expert's "'clinical findings that [the victim] was diagnosed as a victim of a child molest'" in *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1098), which the *Roscoe* court found harmless. And although she tread close to doing so, Rogers never expressly diagnosed S.M. with CSAAS; to the contrary, she pointed out aspects in which S.S.'s situation differed from the CSAAS model. In fact, Rogers repeatedly and expressly

acknowledged on both direct and cross-examination that CSAAS theory did not answer "whether or not there was any sexual contact between Todd Tartaglia and [S.S.]" and "[y]ou can't prove that an event happened just because there are some features present from C[S]AAS . . . ." Consequently, the staggering evidence against defendant persuades us counsel's failure to object to Rogers's testimony did not prejudice him.

In a related point, defendant asserts the trial court erred by failing to sua sponte instruct the jury with a limiting instruction concerning CSAAS, per CALJIC No. 10.64.[3] Generally, "'absent a request by defendant, the trial court has no sua sponte duty to give a limiting instruction.'" (*People v. Smith* (2007) 40 Cal.4th 483, 516; see Evid. Code, § 355, italics added ["the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly"].) The weight of authority holds a limiting instruction regarding CSAAS is required only if requested, rather than sua sponte. (Compare *People v. Housley* (1992) 6 Cal.App.4th 947, 958-959 (*Housley*) [sua sponte instruction required], with *People v. Stark* (1989) 213 Cal.App.3d 107, 116[instruction necessary only upon request]; *People v. Sanchez* (1989) 208 Cal.App.3d

[3] CALJIC No. 10.64 provides: "Evidence has been presented to you concerning [child sexual abuse accommodation] [rape-trauma] syndrome. This evidence is not received and must not be considered by you as proof that the alleged victim's [molestation] [rape] claim is true. [¶] [[Child sexual abuse accommodation] [Rape trauma] syndrome research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that a [molestation] [rape] has occurred, and seeks to describe and explain common reactions of [children] [females] to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt.] [¶] You should consider the evidence concerning the syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with [him] [her] having been [molested] [raped]." (Accord, Judicial Council of Cal. Crim. Jury Instns. No. 1193.)

721, 736 [same]; *People v. Bothuel* (1988) 205 Cal.App.3d 581, 587-588 [same], disapproved on another point in *People v. Scott* (1994) 9 Cal.4th 331, 347-348.)

We need not enter the fray to determine whether a sua sponte limiting instruction on CSAAS is required because any error in failing to provide such an instruction was harmless. (See *Housley, supra*, 6 Cal.App.4th at p. 959 [applying standard under *People v. Watson* (1956) 46 Cal.2d 818, 836, to find omission of instruction harmless].) Rogers herself informed the jury of the limiting instruction's salient point: CSAAS factors are not evidence a molestation occurred. Given Rogers's self-limited testimony and, as described, the overwhelming evidence against defendant, it is not reasonably probable defendant would have obtained a more favorable result had the trial court sua sponte instructed the jury with CALJIC No. 10.64. These factors also thwart defendant's attempt to cumulate the trial court's alleged instructional error with counsel's alleged deficiency in failing to object to Rogers's testimony. Simply put, the alleged failings gain no greater weight cumulatively because Rogers herself cued the jury to view her testimony appropriately and the overwhelming evidence against defendant renders any conceivable error harmless.

## III

## DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.